

**Fashakin v City of New York**

2023 NY Slip Op 30020(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 161122/2017

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

-----X

JACOB FASHAKIN,

Plaintiff,

- v -

THE CITY OF NEW YORK, POLICE OFFICER JOHN DOE,

Defendants.

-----X

INDEX NO. 161122/2017

MOTION DATE 06/14/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34

were read on this motion for SUMMARY JUDGMENT.

This action for, inter alia, false arrest and malicious prosecution, arises out of plaintiff's November 8, 2015 arrest by New York City Police Department ("NYPD") officers (NYSCEF Doc. No. 1 [Compl. at ¶¶5, 7]).

At his General Municipal Law ("GML") §50-h hearing, plaintiff testified that on the date of his arrest, he had emerged from Pennsylvania Station and was walking towards Madison Square Garden to attend a Knicks game when a woman "grabbed" him, saying "It was him. It was him" (NYSCEF Doc. No. 23 [Fashakin GML §50-h Tr. at pp. 30-31]). This woman's husband, Charles Zimmerman, responded "No, it wasn't [him]" (Id.). Zimmerman's wife and plaintiff approached nearby police officers (Id. at p. 30-32, 40-41). Another police officer spoke separately to Zimmerman, after which that police officer informed plaintiff that he was being accused of selling fake tickets (Id.). A police officer then asked plaintiff where he had been thirty minutes earlier and plaintiff informed the officers that he was on the way back from a football game in New Jersey, providing his train ticket and MetroCard (Id. at pp. 30-32).

Plaintiff was arrested and charged with violations of Penal Law §§170.20 (Possession of a Forged Instrument in the Third Degree) and 155.25 (Petit Larceny) (NYSCEF Doc. No. 25 [CSO Response at pp. 22-23 [Criminal Court Complaint]). Following plaintiff's arrest, NYPD Officer James Rahill executed a sworn criminal court complaint stating as follows:

I am informed by Charles Zimmerman, of an address known to the District Attorney's Office, that the defendant gave Mr. Zimmerman two counterfeit tickets for a NY Knicks basketball game in exchange for \$300 of United States Currency

(NYSCEF Doc. No. 25 [CSO Response at p. 23]). Charles Zimmerman subsequently provided a supporting deposition corroborating the factual allegations in the criminal complaint (*Id.* at pp. 42-43).

The charges against plaintiff were dismissed on September 19, 2016 (NYSCEF Doc. No. 25 [CSO Response at p. 22]). Plaintiff commenced this action on December 15, 2017, asserting claims under state and federal law for false arrest, assault, battery, false imprisonment and malicious prosecution, as well as state law claims for negligent training, supervision, and discipline (NYSCEF Doc. No. 1 [Compl. at ¶¶5, 7]). Defendant the City of New York (the "City") now moves, pursuant to CPLR §§3211 and 3212, to dismiss plaintiff's complaint in its entirety. The City argues that: (1) plaintiff's federal claims, pursuant to 42 USC §1983, fail as a matter of law because plaintiff has not named any police officer as a defendant or alleged a governmental policy motivating the alleged false arrest; (2) plaintiff's state law claims—with the exception of his claim for malicious prosecution—must be dismissed based upon plaintiff's failure to timely file a notice of claim; and (3) the City has established its entitlement to summary judgment as to plaintiff's malicious prosecution claims through proof that plaintiff's arrest was supported by probable cause, i.e., the accusation from an identified citizen witness.

For the reasons set forth below, the City's motion is granted in its entirety.

## DISCUSSION

Plaintiff's 42 USC §1983 claims are dismissed. "Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under" that statute, yet "plaintiff has failed to name the individual officers in this case, and therefore [has] not technically made a showing of [their] personal involvement in the case" (Abraham v The City of New York, P.O., 2018 NY Slip Op 32115[U], 6 [Sup Ct, Bronx County 2018] quoting McKinnon v Patterson, 568 F.2d 930, 934 [2d Cir. 1977]). Although the caption includes a "Police Officer John Doe," plaintiff has not amended his complaint to name any of the individual officers involved in his arrest and may not do so now, as the three-year statute of limitations to assert such a claim has elapsed (Id.). Although plaintiff argues that he may nevertheless add these officers as defendants under the relation-back doctrine, this is incorrect, as no unity of interest exists between the City and these officers under the circumstances (See Diaz v City of New York, 160 AD3d 457 [1st Dept 2018]; see also Higgins v City of New York, 144 AD3d 511, 513-14 [1st Dept 2016]). Even ignoring the foregoing, the 42 USC §1983 claims are "palpably insufficient as a matter of law" because "[p]laintiff failed to allege adequately that the claimed deprivation of his constitutional rights was caused by a 'governmental custom, policy, or usage'" (Thomas v City of New York, 154 AD3d 417, 418 [1st Dept 2017] [internal citations omitted]).

Plaintiff's state law claims for false arrest, assault, battery, and negligent training, hiring, retention, and supervision are also dismissed. Plaintiff does not dispute that he filed his notice of claim on October 12, 2016, nearly a year after his arrest—well beyond ninety days after the accrual of these claims—in violation of GML §50-e and failed to timely seek leave to serve a late notice of claim as to these causes of action. Instead, plaintiff argues that the notice of claim is timely as to his malicious prosecution claim, which defendants do not dispute. Defendants argue, instead,

that they have demonstrated their entitlement to summary judgment on this malicious prosecution claim. The Court agrees.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

A “prima facie showing of probable cause for plaintiff’s arrest ... constitutes a complete defense to the claims of ... malicious prosecution” (Williams v City of New York, 210 AD3d 516 [1st Dept 2022] [internal citations omitted]; see also Fambro v City of New York, 205 AD3d 608, 610 [1st Dept 2022]). “In the context of a malicious prosecution action, probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty” (Ramos v City of New York, 285 AD2d 284 [1st Dept 2001]). “Where there is no real dispute as to the facts or the proper inferences to be drawn from such facts, the issue of probable cause is a question of law to be decided by the court” (Brown v Sears Roebuck & Co., 297 AD2d 205, 210 [1st Dept 2002] citing Parkin v Cornell Univ., 78 NY2d 523, 529 [1991]).

Here, the City has “established that the police had information, obtained through statements from eyewitnesses, sufficient to support a reasonable belief that plaintiff had committed multiple offenses warranting arrest” (See Alam v City of New York, 209 AD3d 420, 421 [1st Dept 2022])

[internal citations omitted]). Where, as here, “the victim of an offense communicates to the arresting officer information affording a credible ground for believing the offense was committed and identifies the accused as the perpetrator” probable cause is established absent “materially impeaching circumstances” i.e., whether the police officers had “grounds for questioning the complainant’s credibility” (Medina v City of New York, 102 AD3d 101, 103-04 [1st Dept 2012] [internal citations and quotations omitted]).

In opposition, plaintiff fails to identify any such materially impeaching circumstances. Plaintiff’s contention that Zimmerman initially disagreed with his wife’s assertion that plaintiff had sold them fraudulent tickets is insufficient to establish grounds for the police to question the witnesses’ credibility when plaintiff testified that Zimmerman’s disagreement with his wife occurred before Zimmerman spoke to the police and there is no allegation that Zimmerman repeated this assertion to the police (See Medina v City of New York, 102 AD3d 101, 106 [1st Dept 2012] [plaintiff’s suggestion at examination before trial that complainant’s accusations were prompted by her mother was insufficient materially impeaching circumstances where there was no showing that this theory was presented to the police at or around the time of plaintiff’s arrest]). To the contrary, it is undisputed that Zimmerman was the complaining witness named in the criminal complaint and subsequently provided a supporting deposition. In any event, even if Zimmerman and his wife disagreed in front of the police officers as to whether plaintiff sold them forged tickets, “the alleged conflicting evidence uncovered in the course of the police investigation is relevant to the issue of whether guilt beyond a reasonable doubt could have been proven at a criminal trial, not to the initial determination of the existence of probable cause” (Agmont v City of New York, 294 AD2d 189, 190 [2002] [internal citations omitted]).

Plaintiff also argues that his presentation to the officers of his train ticket and MetroCard should have prompted them to further investigate prior to the arrest. However, a plaintiff's "mere assertion of an alibi, and even the failure to investigate such alibi to plaintiff's satisfaction, does not overcome the existence of probable cause" (Christian v City of New York, --- N.Y.S.3d ---, 2022 NY Slip Op 06864 [1st Dept 2022] quoting Brown v City of New York, 92 AD2d 15, 18 [1st Dept 1983], affd 60 NY2d 893 [1983]; see also Medina v City of New York, 102 AD3d 101, 105 [1st Dept 2012] ["mere denial by the accused of the complainant's claims will not constitute 'materially impeaching circumstances' or grounds for questioning the complainant's credibility so as to raise a question of fact as to probable cause"]).

In short, "[i]nasmuch as there was probable cause for plaintiff's arrest, which was not dissipated by events between the time of the arrest and the commencement of the criminal proceeding, plaintiff's claim for malicious prosecution must also fail" (Agront v City of New York, 294 AD2d 189, 190 [1st Dept 2002]; see also McQueen v City of New York, 209 AD3d 469 [1st Dept 2022]).

Accordingly, it is

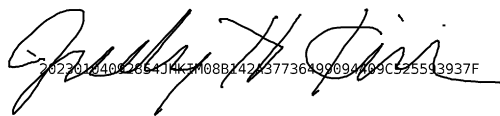
**ORDERED** that the City of New York's motion is granted in its entirety and this action is hereby dismissed; and it is further

**ORDERED** that within twenty days from the date of this decision and order, counsel for the City of New York shall serve a copy of this order with notice of entry on plaintiff as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

*Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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1/4/2023  
DATE

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HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE